Supreme Court, U.S.
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No. 10-441

IN THE

Supreme Court of the United States

JANICE R.,

Petitioner,

v.

DEBRA H.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF

JANICE G. ROVEN
Counsel of Record
LAW OFFICE OF JANICE G. ROVEN
60 East 42 Street, Suite 1163
New York, NY 10165
jroven@aol.com

Attorney for Petitioner

233985

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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PRELIMINARY STATEMENT

Petitioner Janice R. ("Petitioner," "Janice,") submits this Brief in response to the Brief ("Respondent's Brief") submitted by Respondent Debra H. ("Debra"), and in further support of Janice's Petition for Certiorari.

I. THE PETITION SHOULD BE GRANTED AS TO THE FIRST QUESTION PRESENTED.

In her Petition, Janice argued that the New York Court of Appeals improperly applied Vermont law to this exclusively New York dispute, in derogation of Janice's Constitutional due process rights under this Court's decision in *Allstate v. Hague*, 449 U.S. 302 (1981), because the parties reasonably expected the law of New York and not Vermont to apply as New York is the state where both parties and the child have at all relevant times resided.

Debra's counter-arguments have no merit, and should be rejected.

A. The Petitioner's First Question Presented Has Been Adequately Preserved For Review.

Debra relies on *Adams v. Robertson*, 520 U.S. 83 (1997) in support of her argument that Janice did not adequately preserve her first question. *Adams* held that the Court would not reach the question presented because the petitioner in that case had not first presented his federal claim to the Alabama Supreme Court. *Adams, supra,* 520 U.S. at 86. *Adams* is inapposite here

"[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86 n. 9 (1980), citing *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320 (1930); *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917).

Nothing could have been more unexpected than the New York Court of Appeals' sudden *deus-ex-machina*-like invocation of Vermont law to provide Debra with previously unthought-of parental rights, after the entire litigation up to that point had been principally about the continued vitality of the Court of Appeals' own decision in *Alison D. v. Virginia M.*, 77 N.Y. 2d 651 (1991). *Alison D.* held that biological and adoptive strangers to children did not have parental rights under New York law where, as here, there was a fit natural parent. Here, the parties have been litigating the question of whether *Alison D.* was still valid law, through three levels of the New York court system. At the end of this grueling, expensive, and exhausting process, the Court answered the question in the affirmative finding that, in fact, *Alison D.* was still the governing law in the state of New York. However, like an O. Henry short story, the Court resolved the parties' exhausting three-tier journey through the New York Court system with a surprise ending: Vermont law would trump the very policy the Court had just reaffirmed, creating for Debra rights under Vermont law that she had not even claimed, and spawning further litigation in derogation of Janice's rights as a fit natural parent.

Under circumstances such as those presented here, when the parties never raised any principal question other than the continued vitality of the Court of Appeals' own precedent, it would be absurd and unfair to hold Janice to a rule that she should have anticipated the Court's sudden raising the issue of Vermont law so as to raise a federal question, when the applicability of Vermont law only became an issue with the Court's decision.

Moreover, subsequent to the May 4, 2010 decision of the New York Court of Appeals,in her motion for rehearing Janice did indeed raise the issue of whether the New York Court of Appeals' application of Vermont law violated the Equal Protection and Due Process clauses. Where, as here, the state court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a motion or petition for rehearing will not bar this Court's review. See, e.g., *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930). The requirements for preserving a federal claim are minimal; indeed, this Court has held that a litigant may preserve his claim for review by simply labeling the claim "federal." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). Janice certainly met that standard here.

Finally, it is evident simply from reading the May 4, 2010 opinion of the New York Court of Appeals, review of which is sought herein, that the issue of whether the parties reasonably expected New York law to apply rather than that of Vermont was an issue before the Court, and thus properly preserved for review, as was the issue of whether Vermont law should apply. The New

York Court of Appeals reviewed the evidence in the motion record on this point, and rejected the argument that Janice reasonably expected New York law to apply. *Debra v. Janice,* 14 N.Y.3d 576, 599 (2010). Thus, whether or not Janice reasonably expected the Vermont law to apply – the inquiry that is the essence of the federal claim -– was at the core of the issues considered by the New York Court of Appeals.

Thus, all of the components of the Petitioner's federal claim – the question of the extraterritorial application of the Vermont law and whether or not the parties reasonably expected the Vermont law to apply to their civil union — were before the New York Court of Appeals. And the constitutionality of the decision of the Court of Appeals was raised in the motion for a rehearing filed subsequent to the May 4, 2010 decision, in which she challenged the Court's application of Vermont law as violative of her Equal Protection and Due Process Rights. Therefore, contrary to Debra's contentions, the first question presented in the Petition is properly preserved. This Court has jurisdiction over Janice's first question presented under 28 U.S.C. § 1257.

B. Petitioner's First Question Presented Is Both Meritorious and Important./

Debra cites a trial court's decision in a personal injury case, *Langan v. St. Vincent Hospital,* 196 Misc.2d 440 (Supreme Court 2003). However, that court's express language cautioned that its decision could not be applied beyond the applicability of a civil union to the wrongful death statute: "the court will not determine

whether plaintiff has a valid marriage in the State of New York for all purposes, but only whether he may be considered a spouse for purposes of the wrongful death statute [.]" *Langan*, 196 Misc.2d at 444-45. Moreover, reinforcing Janice's 2003 conclusion that the Vermont civil union statute had no applicability to her exclusively New York relationship, the trial court decision relied upon by Debra was subsequently overruled. *Langan v. St. Vincent Hospital*, 25 A.D.3d 90, 802 N.Y.S.2d 476 (2d Dep't 2005).

The record shows that the parties reasonably expected New York, rather than Vermont, parentage law to apply to this exclusively New York relationship. Indeed, that was the entire basis for the Debra's commencement of the action that began this odyssey. In her original pleadings Debra's primary argument was that a New York Court of Appeals case entitled *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320 (1994), effectively overruled *Alison D.* and that therefore New York law now gave Debra some theretofore denied parental rights despite her lack of adoptive or biological connection to the child. In that pleading Debra argued only that the Court should take notice of the civil union as further evidence of the parties intentions so as to further support the application of the equitable estoppel doctrine under *Shondel*.

Thus clearly, at the outset of this litigation both Debra and Janice shared the view that New York law was the law governing their relationship. They just disagreed on the precise coutours of New York law in the wake of *Shondel*. And of course, their shared view in this regard –that the Vermont statute was of no legal

effect in New York—was supported by the weight of authority which had held that the Vermont civil union law was of no force outside Vermont. Even the New York Court of Appeals admitted the uncertainty surrounding the applicability of the Vermont law in 2003, reasoning that " ' [i]n fact, the potential legal ramifications in New York of entering into a civil union in Vermont were uncertain in 2003 ' " – *Respondent's Brief,* p. 9, quoting *Debra v. Janice,* 14 N.Y. 3d at 599. Despite what the Court admits was the lack of clarity surrounding the Vermont law, the Court presumed that Janice somehow understood the ramifications under that law of entering into a civil union while eight months pregnant. *Id.,* 14 N.Y.3d at 605-06 (Graffeo, J., concurring). The Court of Appeals is thus at cross-purposes with itself over the question, crucial to her federal claim, as to whether Janice reasonably anticipated that the Vermont law would apply to her exclusively New York relationship to determine parentage rights.

Debra cites inapplicable New York law regarding children born in recognized *marriages* (*Respondent's Brief,* p. 12, n.7), glossing over the fact that the Vermont civil union between the parties was not and is not regarded as a marriage under New York law. Debra even cites the recent New York Court of Appeals in *Godfrey v. Spano,* 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009) as "upholding" recognition of same-sex marriage, when in fact in that case the Court held the precise opposite. *Respondent's Brief,* p. 12, n. 7. *Godfrey* affirms precisely what Janice argued in her papers in support of the Petition – that New York has always had, and continues to have, a strong policy against affording judicial recognition to same-sex marriages.

Debra attempts to limit this Court's decisions in *Allstate v. Hague,* 449 U.S. 302 (1981) and *Phillips Petroleum Company v. Shutts,* 472 U.S. 797 (1985) to situations in which litigants who are non-residents of the forum state are subjected to the law of the forum state. *Respondent's Brief,* p. 13-15. Such an attempt belies the "reasonable expectation" test articulated by this Court in those cases. Debra does not even attempt to gainsay Janice's contention that Vermont's contacts with the parties are minimal – indeed, except for the civil union, non-existent. All of the remaining contacts are with New York. Under these circumstances, application of Vermont law to regulate the parentage and obligations of the parties, was fundamentally unfair and violated the Petitioner's due process rights.

Janice's expectations that only New York law would apply to this New York dispute amount to more than the "poor legal prediction" derided by Debra (*Respondent's Brief,* p. 14). As noted above, throughout their relationship as at the inception of this litigation, Debra made precisely the same prediction and had the same expectations as evidenced by all of her pleadings filed in this case. Janice's reasonable expectations, which were the same as Debra's, crucially determined her Due Process rights. Debra's attempts to minimize them should be rejected, and the Petition for Certiorari should be granted.

C. There Is A Conflict Between The Approach Taken By The Court Of Appeals Here And That Taken By Other State Courts Of Last Resort.

Debra argues that there is no conflict between the decision of the New York Court of Appeals and the decisions of other courts of last resort. *Respondent's Brief*, pp. 1-2. Debra is wrong. Contrary to the approach taken by the Court of Appeals here, in cases concerning parental rights where a child was conceived by artificial insemination such as the case at bar, state courts have satisfied the significant contact or significant aggregation of contacts standard by weighing the number and significance of contacts between the parties and different states. *See, e.g., In re K.M.H.*, 285 Kan. 53, 59-62 (2007) (in artificial insemination case, Kansas law would apply rather than Missouri where the only contact with Missouri was that the insemination clinic was located there, and the parties resided in Kansas, entered into their agreement in Kansas, and the child was born in Kansas); *In re Marriage of Adams*, 133 Ill.2d 437, 447, 551 N.E.2d 635 (1990) (in artificial insemination case involving a heterosexual married couple, Florida law would apply rather than Illinois where parties had been Florida residents, artificial insemination had been performed in Florida, and baby was born in Florida, and only contact with Illinois was that the wife had moved there for the divorce).

Had the New York Court of Appeals applied this traditional and constitutionally sanctioned weighing-of-contacts test, the result would have been that the substantive law of New York would have applied to all

aspects of this relationship. As noted above the parties' only significant contacts were with New York State. And, the child of the relationship, M.R., has not one single contact with Vermont.

D. This Case Presents An Important Case For Review, And Should Be Reviewed, Notwithstanding That There Are Ongoing Proceedings On Remand.

Debra also does not develop her argument (*Respondent's Brief*, pp. 1-2) that the case should not be reviewed because the facts are unlikely to recur and because there are proceedings on remand. While the specific facts in this case are unlikely to recur precisely, the question of the extra-territorial application of state statutes recognizing civil unions and same-sex marriages has spawned a number of reported cases, and is likely to give rise to more, given the wide variety of family types and the dramatically different policies of the several states. The number of couples who have undergone civil unions in Vermont and other states which have similar statutes is enormous; this case is of critical importance to them. More than that, the question of what law the Constitution requires is so fundamental, and has given rise to such confusion, that this case presents an important case for review.

Lastly, the fact that there are proceedings on remand cannot be a reason to pass on an important issue of Constitutional significance. The issue of what law the Constitution requires courts to apply in family law cases has created a great deal of confusion. This Court can resolve much of this confusion by revisiting this question as presented in this case.

II. THE PETITION SHOULD BE GRANTED AS TO THE SECOND QUESTION PRESENTED.

In its decision, the New York Court of Appeals, while announcing that its Legislature did not grant parental status to biological or adoptive strangers granted to Debra parental rights under the statute of a foreign jurisdiction with only an incidental contact with the parties and the facts.

Thus, Debra's argument that this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000) did not create a fundamental right to exclude other persons and other types of parents (*Respondent's Brief*, pp. 16-17) merely sets up and attacks a straw man. Debra misses the point. Janice argues here that *Troxel* recognized that fit natural parents like herself have a right to the custody and control of their children that is so fundamental, that the New York Court of Appeals' award Debra of parental rights under Vermont law that *Vermont* would be unlikely to recognize without the appropriate fact-finding hearings, was premature and violative of Janice's *Troxel* rights.

Vermont's highest court, in construing the civil union statute, reviewed a range of factors including the expectations of the parties in reaching the conclusion that the civil union ex-partner who had no biological connection to the child was a "parent" for purposes of the Vermont statute. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441,465, 912 A.2d 951 (2006). The New York Court of Appeals did not consider whether any of these factors were present in the instant case. This is not an "unpreserved argument" (*Respondent's Brief, p.* 16,

n.8), but an illustration of the lack of care with which the New York Court of Appeals treated the issue of Janice's rights even assuming the applicability of Vermont law.

Thus, the granting of parental rights to the Respondent as a "parent" was premature in a way that was in derogation of Janice's fundamental liberty interests as a fit natural parent. No hearing or other inquiry had been held anywhere in the record to inquire into the *Miller-Jenkins* factors. The hasty and slapdash manner in which the New York Court of Appeals applied the Vermont law thus swept violated the Petitioner's substantive due process rights as a fit natural parent.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

JANICE G. ROVEN
Counsel of Record
LAW OFFICE OF JANICE G. ROVEN
60 East 42 Street, Suite 1163
New York, NY 10165
jroven@aol.com

Attorney for Petitioner